BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	

To: The Commission

EMERGENCY MOTION FOR STAY OF THE CMRS LNP DEADLINE

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SUMMARY

Movants, through their *Petition to Rescind* and the instant request for stay, are merely seeking their day in court. The Commission has not acted on the *Petition to Rescind* which raises a serious question of whether the Commission has statutory authority to impose LNP obligations on CMRS carriers given the express language of Sections 251(b)(2) and 153(26) of the Communications Act of 1934, as amended. At this point, FCC action on the petition will not give the Court time to review the legality of the LNP mandate. Therefore, this motion for stay is the only mechanism available for Petitioners to obtain judicial review before the LNP deadline. Movants, however, cannot wait long for Commission action on this motion given the rapidly-approaching November 24, 2003 implementation deadline. Therefore, absent expeditious action by the Commission, Movants expect to seek relief from the United States Court of Appeals in the near future.

The Commission has already agreed to the propriety of having judicial review on whether the Commission has authority to impose LNP obligations on CMRS carriers. It stipulated, in agreeing to the voluntary dismissal of the appeal of the original LNP rulemaking (which included a jurisdictional challenge), to preserve all issues raised for any future appeal. Despite the clear intention of the parties, however, the Court of Appeals did not review the merits and found that Movants' challenge to the Commission's statutory authority must be raised in the context of a petition to rescind the CMRS LNP rule. Nevertheless, the Commission has refused to act on the *Petition to Rescind*.

By this filing, Movants are requesting that the Commission provide sufficient time to secure the right of judicial review – the expressed purpose of the stipulation. Movants meet all four elements of the Virginia Petroleum Jobbers standard for a stay.

First, the weight of authority demonstrates that the Commission has no statutory authority to impose LNP obligations on wireless carriers. Second, Movants and other CMRS carriers face enormous, unrecoverable loss absent a stay of the November 24, 2003 wireless LNP implementation deadline. Third, no other party, including the Commission and consumers, will suffer harm if such a stay is granted. Fourth, the balance of the equities easily demonstrates that grant of the requested stay will serve the public interest because it will (1) avoid the implementation of an unlawful rule, (2) protect CMRS carriers from potentially irreparable economic harm resulting from implementation of the unlawful rule, and (3) not impose new and untoward burdens on third parties.

Finally, because there are numerous unresolved issues regarding implementing wireless LNP, a stay will serve the public interest by preventing confusion among carriers and with their customers regarding their respective rights and obligations. The Commission should, therefore, stay the November 24 deadline until final judicial action on the *Petition to Rescind*.

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Cingular Wireless LLC, and AT&T Wireless Services, Inc. ("Movants"), hereby move the Commission to stay Section 52.31 of the Commission's rules, 47 C.F.R. § 52.31, to the extent it requires Commercial Mobile Radio Service ("CMRS") carriers to provide local number portability by November 24, 2003, pending Commission action and final judicial review on Movants' Expedited Petition for Rulemaking to Rescind the CMRS LNP Rule ("*Petition to Rescind*") filed in the above-captioned proceeding on June 16, 2003.[1] Movants, through their *Petition to Rescind* and the instant request for stay, are merely seeking their day in court, if necessary, to get a judicial determination whether the FCC lawfully imposed LNP on CMRS carriers before the LNP implementation deadline. Assuming the Commission has the requisite authority, additional time is also needed to resolve the many pending implementation issues, adopt rules, and negotiate agreements.

Movants still believe that expedited action on the *Petition to Rescind* is appropriate. The issue of whether the Commission has statutory authority to impose LNP obligations on CMRS carriers has been raised before the Commission on numerous occasions, has been subject to public comment, and has even been briefed before the Court. Thus, Movants believe that the

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[1] Movants are CMRS carriers affected by the application of LNP obligations to the CMRS industry.

Commission can act on their *Petition to Rescind* quickly with a short order simply cross-referencing the long history of this issue.

I. BACKGROUND

Section 52.31 states in pertinent part that "[b]y November 24, 2002, all covered CMRS providers must provide a long-term database method for number portability...."[2] The rule is currently scheduled to go into effect November 24, 2003.[3] There are no specific rules governing how wireless LNP is to be implemented. Beginning in 1998, the North American Numbering Council ("NANC"), an advisory committee commissioned by the FCC to make recommendations and coordinate number portability, presented to the FCC a list of outstanding policy and technical issues that could not be resolved absent more specific direction from the Commission. The Commission has not issued any orders in response to the NANC submissions, and, thus, has failed to ensure a uniform standard for wireless LNP.

On June 6, 2003, the U.S. Court of Appeals for the D.C. Circuit ("Court") dismissed in part and denied in part the petition of the Cellular Telecommunications & Internet Association ("CTIA") and Verizon Wireless for review of the *Verizon Wireless Order* denying permanent forbearance from enforcement of Section 52.31.[4] Verizon Wireless, CTIA and the intervenors supporting their petition for review all raised before the Court the question of whether the FCC had statutory authority to impose LNP obligations on CMRS carriers. The issue was presented pursuant to a stipulation between the Commission and Bell Atlantic NYNEX Mobile, Inc. ("Bell Atlantic Mobile"), Verizon Wireless's predecessor-in-interest. By the stipulation, the

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[2] 47 C.F.R. § 52.31.

[3] *See Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, 17 FCC Rcd 14972 (2002) ("*Verizon Wireless Order*").

[4] *Cellular Telecommunications & Internet Ass'n and Cellco Partnership d/b/a Verizon Wireless v. FCC*, 330 F.3d 502 (D.C. Cir. 2003).

Commission agreed that the matter could be raised in a later proceeding in return for the voluntary dismissal of Bell Atlantic Mobile's appeal of the order originally mandating wireless LNP.[5]

The Court, despite this stipulation, dismissed the challenge to the Commission's authority to impose wireless LNP as time-barred with regard to the 1996 LNP rulemaking decision. While the Court refused to hear the challenge to the Commission's statutory authority over wireless LNP in that appeal, it observed that the issue could properly be raised by filing a petition to rescind the rule and appealing a denial of the petition. Specifically, it found that:

> [T]here are at least two notable circumstances in which the Court will entertain challenges beyond a statutory time limit to the authority of any agency to promulgate a regulation: (1) following enforcement of the disputed regulation; and (2) following an agency's rejection of a petition to amend or rescind the disputed regulation.[6]

The *NLRB* case cited by the Court recognized that "a petitioner's contention that a regulation should be amended or rescinded because it *conflicts with the statute* from which its authority derives is reviewable outside of a statutory limitations period" for challenging the original rulemaking.[7]

On June 16, 2003, ten days later, Movants filed the *Petition to Rescind* again demonstrating that the Commission lacks statutory authority to impose LNP obligations on CMRS carriers. Movants also argued that expedited treatment was warranted because the Commission had already considered this pure question of law and concluded that it had authority

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[5] *See* Joint Motion for Dismissal, *Bell Atlantic NYNEX Mobile, Inc. v. FCC*, No. 97-9551 (10th Cir. Filed March 19, 1999).

[6] *CTIA v. FCC*, 330 F.3d at 508 citing *NLRB Union* v. *FLRA*, 834 F. 2d 191, 195-97 (D.C. Cir. 1987) (emphasis added).

[7] *NLRB Union,* 834 F. 2d at 196-197.

to impose LNP[8] and given the rapidly-approaching November 24, 2003 implementation deadline.

II. MOVANTS SATISFY THE CRITERIA FOR GRANT OF A STAY

In determining whether grant of a stay is warranted, the Commission generally follows the four-part *Virginia Petroleum Jobbers* standard.[9] Under this standard, the Commission considers: (1) whether there is a likelihood of success on the merits; (2) the threat of irreparable harm absent grant of a stay; (3) the degree of injury to other parties if the relief is granted; and (4) whether grant of a stay will further the public interest. The Commission will balance these four criteria in order to fashion a response on a case-by-case basis. Thus, there is no requirement that there be a showing as to each factor; if "there is a particularly overwhelming showing in at least one of the factors, [the Commission] may find that a stay is warranted notwithstanding the absence of another one of the factors."[10] Movants meet all four elements of the *Virginia Petroleum Jobbers* standard for a stay.

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[8] *Telephone Number Portability*, 11 FCC Rcd. 8352, 8431-32 (1996) ("*LNP First Report and Order*"); *see also Verizon Wireless Order*, 17 FCC Rcd. at 14973, n. 4; FCC Brief, D.C. Cir. No. 02-1264, at 33-39 (filed Feb. 3, 2003).

[9] *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The Commission has declined to encode a single evidentiary standard for stay requests, but rather considers the criteria set forth in *Virginia Petroleum Jobbers* to evaluate requests for interim relief. *See Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, 12 FCC Rcd 22497, 22565-66 (1997); *see also Biennial Regulatory Review – Amendment of Parts 0, 1, 12, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in Wireless Telecommunications Services*, 14 FCC Rcd 9305, 9307 (1999) (applying the *Virginia Petroleum Jobbers* standard).

[10] *Biennial Regulatory Review,* 14 FCC Rcd at 9307 quoting *AT&T v. Ameritech*, 13 FCC Rcd 14508 ¶ 43 (1998). For example, the Commission has stated that it avoids a wooden application of the probability of success on the merits test, recognizing that a stay may be granted based on a high probability of injury and some likelihood of success on the merits. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 21872 (CCB 1997).

The Commission has already agreed in principle to the propriety of having judicial review on whether the Commission has authority to impose LNP obligations on CMRS carriers. The Commission stipulated, in agreeing to the voluntary dismissal of the appeal of the original LNP rulemaking (which included a jurisdictional challenge), to preserve all issues raised for any future appeal.[11] Specifically, the FCC agreed it "shall not object" to the presentation of the "same issues and arguments ... in any other proceeding involving review" of FCC action on number portability.[12] Despite the clear intention of the parties, the Court of Appeals did not review the merits and found that the agreement did not bind the Court.[13]

By this filing, Movants are requesting that the Commission provide sufficient time to secure the right of judicial review – the expressed purpose of the stipulation. As discussed below, the weight of authority demonstrates that the Commission has no statutory authority to impose LNP obligations on wireless carriers. Thus, a stay will prevent an unlawful rule from going into effect and will grant Movants the opportunity to secure their day in court.

As a preliminary matter, a stay will also have other beneficial consequences. Again, there are numerous unresolved issues regarding implementing wireless LNP. As discussed in detail below, the absence of resolution on these issues will lead to confusion on the part of carriers and their customers regarding their respective rights and obligations regarding LNP. Carriers will face the loss of customers, higher customer acquisition costs, and will be required to expend enormous resources which they may not be able to recover. The Commission should, therefore, stay the LNP implementation deadline until final judicial action on their *Petition to Rescind*.

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[11] *See* Joint Motion for Dismissal, *Bell Atlantic NYNEX Mobile, Inc. v. FCC*, No. 97-9551 (10th Cir. filed March 19, 1999).

[12] Stipulation at 1.

[13] *CTIA v. FCC*, 330 F.3d at 508-09.

A. Movants are Likely to Prevail on the Merits

Movants are likely to succeed on the merits of their challenge to the Commission's statutory authority to impose LNP obligations on CMRS carriers. Congress has already determined that only local exchange carriers, and *not* wireless carriers, are required to provide number portability. The Commission has also acknowledged that Section 251(b) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 251(b), specifically excludes CMRS carriers from the numerous obligations imposed on local exchange carriers, including LNP.[14]

The Commission, however, has tried to avoid this problem by concluding that it has implied authority to impose LNP obligations on CMRS carriers under Sections 1, 2, 4(i) and 332 of the Act, *id.* §§ 1, 2, 4(i), and 332. The FCC's claim of "independent authority" to require wireless number portability as it "deem[ed] appropriate," based only on these broad, general statutory provisions, is unfounded.[15] The FCC shoulders a heavy burden when it relies on generic provisions of the Communications Act enacted years or decades earlier, to overcome a recent Congressional action, specifically allocating regulatory obligations among classes of telecommunications carriers. Moreover, its interpretation of the statutory provisions regarding its authority is entitled to no deference.[16] By any reasonable reading of the statute, the FCC overstepped the limits of its jurisdiction.

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[14] *LNP First Report and Order,* 11 FCC Rcd at 8431-32.

[15] *Id.*

[16] The FCC's interpretation of the sections of the Communications Act as sources of its authority is not entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1994). The agency's interpretation of the statute is not entitled to deference absent a delegation of authority from Congress to regulate in the areas at issue. *See Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (*Chevron* "deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'") (*quoting Chevron,* 467 U.S. at 843-44); *Motion Picture Ass'n v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("*MPAA*"). The FCC cannot, through interpretation of the statute, grant itself power that

An agency has no power to act without a delegation by Congress;[17] it possesses only those powers *granted* by Congress. Stated another way, an agency does not possess all powers *except those forbidden* by Congress – otherwise agencies would have virtually limitless discretion in violation of *Chevron* and the Constitution.[18] The Commission cannot adopt rules and impose mandates simply because Congress did not expressly preclude such action, especially where Congress left no "gap for the agency to fill."[19]

As the Commission has acknowledged, Section 251 of the Act is the sole statutory provision addressing LNP.[20] That section references all telecommunications carriers (including CMRS providers), local exchange carriers ("LECs") and incumbent LECs, and delineates which entities are required to provide LNP. "Statutory provisions *in pari materia* normally are construed together to discern their meaning."[21] Accordingly, the various provisions of Section

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Congress did not delegate to it. In *MPAA,* the Court flatly dismissed such the notion that the Commission may grant itself authority Congress has withheld: "The FCC's position seems to be that the adoption of rules mandating video description is permissible because Congress did not expressly foreclose the possibility. This is an entirely untenable position." *See Ry. Labor Executives,* 29 F.3d at 671 ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.").

17 *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Stark v.Wickard*, 321 U.S. 288, 309 (1944); *MPAA*, 309 F.3d at 801.

18 *Ry. Labor Executives*, 29 F.3d at 670-71.

19 *Id.*, 29 F.3d at 671 (*citing Chevron*, 467 U.S. at 843-44). *See also Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir. 1998) ("[A]gency power is 'not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)), *aff'd*, 529 U.S. 120 (2000).

20 *See LNP First Report and Order*, 11 FCC Rcd. at 8431-32.

21 *MPAA*, 309 F.3d at 801 citing *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972).

251, construed together, establish the scope of the Commission's power to require LNP. Simply put, then, the FCC is empowered to require LNP only to the extent specified in Section 251.[22]

Congress, in Section 251, expressly limited the class of carriers to be subject to LNP requirements. Specifically, Sections 251(a)-(c) set forth a "carefully-calibrated regulatory regime crafted by Congress," with a "three-tiered hierarchy of escalating obligations based on the type of carrier involved."[23] Subsection (a) sets forth the relatively limited duties applicable to all telecommunications carriers, but is silent regarding LNP. Subsection (b) imposes five separate obligations, including LNP, *applicable only to LECs*, and gives the Commission LNP standard-setting authority. At the same time, Congress defined LECs to *exclude* CMRS carriers unless and until the FCC determines otherwise,[24] a finding the FCC has repeatedly and correctly declined to make.[25] Section 251(c) imposes additional requirements on *incumbent* LECs. Moreover, in contrast to the limited authority to impose LNP in subsection (b), Section 251(e) gives the FCC plenary authority over numbering administration. Thus, it is clear Congress knew how to include and exclude CMRS carriers regarding LNP and to define the FCC's jurisdiction

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[22] *See Ry. Labor Executives*, 29 F.3d at 671; *Chevron*, 467 U.S. at 843-44; *see also MPAA*, 309 F.3d at 801

[23] *Guam Public Utilities Commission,* 12 FCC Rcd 6925, 6937-38 (1997).

[24] 47 U.S.C. § 153(26) ("The term 'local exchange carrier' . . . does *not* include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term") (emphasis added).

[25] *See Verizon Wireless Order*, 17 FCC Rcd at 14972-73 ("Commercial Mobile Radio Service (CMRS) carriers are not LECs, and thus are not included in section 251(b) . . . ."); *Petition of the State Independence Alliance for a Declaratory Ruling,* 17 FCC Rcd 14802, 14806 (2002) ("CMRS providers are not subject to the statutory requirements imposed on LECs in section 251(b)"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15996 (1996) (stating that the FCC will not define CMRS providers as LECs absent evidence that wireless services "replace wireline loops for the provision of local exchange service") (subsequent history omitted); *Administration of the North American Numbering Plan Carrier Identification Codes*, 13 FCC Rcd 3201, 3206 n.21 (1998) (noting that CMRS providers "are not classified as LECs").

narrowly (LNP) or broadly (numbering administration) as it deemed appropriate. It reviewed the competitive landscape and decided LNP should be required only of LECs.

The exclusion of carriers other than LECs from LNP requirements and other Section 251(b) requirements reflects a deliberate choice by Congress, negating any implied power of the Commission to choose otherwise. As the Supreme Court has held, "an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance."[26] Here, Congress intended to confine the LNP requirement to LECs. This is confirmed in the Act's legislative history. The original House bill included portability as one of the "specific requirements of openness and accessibility that apply to LECs as competitors enter the local market."[27] The Act's Conference Report states that "the duties imposed by new section 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person who actually seeks to connect with or provide services using the LEC's network."[28]

The FCC recognized in implementing Section 251 that the statute withdrew authority to impose LNP on wireless carriers:

> The statute . . . *explicitly excludes* commercial mobile service providers from the definition of local exchange carrier, and therefore from the section 251(b) obligation to provide number portability, unless the Commission concludes that they should be included in the definition of local exchange carrier.[29]

Simultaneously, however, the Commission found "independent authority" to require wireless LNP "as we deem appropriate" from the general delegations in Sections 1, 2, 4(i), and

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26 *Field v. Mans*, 516 U.S. 59, 67 (1995).

27 H.R. Rep. No. 204, 104th Cong., 1st Sess. 71-72 (1995).

28 Joint Explanatory Statement, H.Conf. Rep. 104-458, 10th Cong., 2d Sess. 121 (1996).

29 *LNP First Report,* 11 FCC Rcd at 8431 (emphasis added).

332 of the Act.[30] These provisions do not mention LNP, nor can they serve as a jurisdictional basis to override the specific reservations in Section 251.

Reliance on these provisions is barred by the canon of statutory construction that "the specific governs the general."[31] This canon is "a warning against applying a general provision *when doing so would undermine limitations created by a more specific provision.*"[32] Congress spoke comprehensively and specifically to LNP in Section 251(b). Thus, the FCC cannot rely on general powers conferred by Sections 1, 2, 4(i) and 332 to negate Congress' contrary directive. The separate statement of Commissioner Furchtgott-Roth in the *2000 Forbearance Reconsideration Order* aptly observes:

> The Commission has grounded its [wireless LNP] authority in sections 1, 2, 4(i), and 332 of the Communications Act. I have long voiced concern about this agency's efforts to impose costly and far-reaching regulatory obligations based on authority cobbled together from various general and ancillary provisions of the Act. Such assertions of jurisdiction are particularly troubling here in light of section 251's statutory provision specifically mandating number portability solely for local exchange carriers.[33]

Nor do these sections grant the Commission independent jurisdiction to impose LNP requirements on CMRS providers. As the Court recognized in *MPAA*, the FCC has "necessary and proper" authority only where another provision contains a specific delegation of authority.[34]

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30 *Id.* at 8431-32. The *Verizon Wireless Order* references the *LNP First Report* where, in response to challenges by Movants and others, the FCC fully addressed its implied authority to require wireless LNP. *Verizon Wireless Order*, 17 FCC Rcd at 14972 & n.3.

31 *Morales v. Transworld AirLines*, 504 U.S. 374, 384-385 (1992) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).

32 *Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996) (emphasis added).

33 *Telephone Number Portability, Cellular Telecommunications Industry Association's Petition for Forbearance*, 15 FCC Rcd 4727, 4739 (2000) ("*2000 Forbearance Reconsideration Order*") (Separate Statement of Commissioner Furchtgott-Roth).

34 *MPAA*, 309 F.3d at 806.

Sections 2 and 4(i) contain no affirmative mandates.[35] Further, Section 1 constitutes only a general delegation of authority to the Commission and never mentions LNP.[36] It grants the Commission such limited authority as is "reasonably ancillary to the effective performance of the Commission's various responsibilities."[37] Courts have upheld the FCC's exercise of ancillary jurisdiction in cases where (1) Congress did *not* expressly address and define the scope of the Commission's authority with respect to the regulated area at issue; and (2) there was a demonstrated need to imply authority to discharge the will of Congress.[38] Here, however, Congress has clearly expressed its will regarding LNP in Section 251(b) and thus there is no basis to invoke ancillary authority under Section 1.

In fact, Section 1 was enacted to ensure that all Americans "have access to wire and radio communication transmissions" and the mandate is a "reference to the geographic availability of service."[39] LNP, however, does not deal with access to service in a particular area. It is a service feature provided to a subscriber who already *has* service.

Finally, Section 332 cannot serve as authority for the FCC to impose a wireless LNP mandate. While Section 332 does constitute a grant of authority over certain wireless matters, it is silent regarding LNP and thus cannot be read as an override of the specific statutory scheme of Section 251(b). Even assuming that the Act did not already speak to the question of which entities must offer LNP, Section 332 still would not provide a basis for implied authority. This

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35 *Cf.* 47 U.S.C. §§ 152, 154(i). Section 4(i) states that the Commission may undertake only those acts that are consistent with the terms of the Act.

36 *Cf. id.* § 151.

37 *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also California v. FCC*, 905 F.2d 1217, 1240-41 & n.35 (9th Cir. 1990).

38 *See, e.g., Southwestern Cable*, 392 U.S. at 164-78 (upholding FCC authority to regulate cable where there were no preexisting statutory provisions regarding FCC oversight of the cable industry and the FCC demonstrated a need to regulate flowing from its broadcast responsibilities).

39 *MPAA*, 309 F.3d at 804.

section requires the Commission to treat CMRS providers as common carriers but permits the FCC to forbear from certain statutory requirements normally associated with landline service, (*e.g.*, tariffs).[40] It also preempts state regulation over wireless rates and market entry.[41] The main objectives of Section 332 are regulatory parity among like wireless services and deregulation.[42] Thus, as the FCC has recognized:

> Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.[43]

No showing has been made (nor could be made) that imposing wireless LNP is needed to carry out the objectives of Section 332.

The Commission further expanded its assertion of implied authority to impose wireless LNP in its brief filed in *CTIA v. FCC,* No. 02-1264 (filed Feb. 3, 2003). The FCC did not dispute that (1) Section 251(b)(2) is the only provision of the Act specifically addressing LNP; (2) Section 251(b)(2) grants the Commission specific authority to impose LNP requirements only on LECs and Section 153(26) defines the term "LEC" to exclude CMRS carriers, unless the FCC

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40 *See* 47 U.S.C. § 332(c)(1)(A). Under the Act and the Commission's rules, a "common carrier" is not the same as a "LEC." "Common carrier" is a broad category of entities that offer services to the public, while "LEC" includes only carriers that offer service within, and access to, a telephone exchange network.

41 *See id.* § 332(c)(3)(A).

42 *See* H.R. Rep. No. 103-111, at 259-60 (1993) (emphasizing the purpose of section 332 to achieve "regulatory parity" among providers of "equivalent mobile services"); *Petition of the Connecticut Department of Public Utility Control*, 10 FCC Rcd 7025, 7030-31 (1995) ("*Connecticut DPUC*") (recognizing that section 332 expresses a "general preference in favor of reliance on market forces rather than regulation," and "places on [the FCC] the burden of demonstrating that continued regulation will promote competitive market conditions"), *aff'd sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2nd Cir. 1996).

43 *Connecticut DPUC*, 10 FCC Rcd at 7035 (1995); *see also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988, 7992 (1994) ("[C]onsumer demand, not regulatory decree, [should] dictate[] the course of the mobile services marketplace.").

finds otherwise;[44] and (3) the FCC has consistently ruled that CMRS carriers are not LECs. But, it did argue that because Section 153(26) grants it authority to define the scope of the term LEC, the Act "suggests strongly that Congress decided to leave the question of extending LEC-specific requirements to CMRS carriers to the expert judgment of the Commission." FCC Br. 34. This argument stands the statute on its head and is inconsistent with the legislative history.

Nothing in Sections 153(26) or 251 authorizes the Commission to pick and choose LEC-specific requirements to impose on CMRS carriers, absent a finding that CMRS carriers are LECs. Indeed, could it do so, Section 153(26) would be nullified and useless. Section 153(26) authorizes the Commission to determine whether the term LEC should include wireless carriers. If, and only if, the Commission makes that finding, do wireless carriers become subject to a variety of LEC-specific requirements. Moreover, the FCC admitted that:

> Because the development of the wireless industry has a different history – one in which service already was provided by a number of carriers in 1996, and not through a monopoly – Congress did not explicitly impose all of the obligations in Section 251 on wireless carriers.

FCC Br. 34.

The FCC also argued that it had implied authority over wireless LNP prior to the enactment of Section 251(b)(2) and the 1996 Act evinced "no intent to *take away* the Commission's authority to require telecommunications carriers that are not LECs to offer LNP." FCC Br. at 33 (emphasis added). The Commission's argument missed the point. Section 251(b)(2) does not constitute a repeal of pre-existing authority. Rather, it sets forth a specific mechanism by which the Commission can impose LNP requirements on wireless carriers. Thus, insofar as the FCC has correctly decided that CMRS carriers are not LEC equivalents, it lacks authority to impose LNP obligations on wireless carriers.

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[44] 47 U.S.C. §§ 153(26), 251(b)(2).

In any event, the Commission's attempt to create the impression that it had pre-existing authority before the passage of Sections 251 and 153(26) in the 1996 Act is wrong. Prior to the 1996 Act, the Commission had "asserted authority" over LNP by way of a "tentative" finding in a Notice of Proposed Rulemaking which asked for comment. *See In the Matter of Telephone Number Portability*, 10 FCC Rcd 12350 (1995). It had not issued any final ruling, nor was there judicial review of the matter. The FCC *ruled* it had implied authority only *after* the 1996 Act. *See Telephone Number Portability*, 11 FCC Rcd 8352. Thus, the FCC has not shown there was any LNP authority to be preserved by the 1996 Act's savings clause (47 U.S.C. § 152 note).[45] More important, the enactment of Section 251 resolved the question, setting up a specific mechanism by which the Commission could impose wireless LNP.

The Commission's reliance on case law stemming from its general authority in Sections 1, 4(i) and 332 was also without merit. As noted above, ancillary jurisdiction can only be invoked where (1) Congress did *not* expressly address and define the scope of the Commission's authority with respect to the regulated area at issue, and (2) there was a demonstrated need to imply authority to discharge the will of Congress. The cases cited are consistent therewith.[46] Here, by contrast, Section 251(b)(2) expressly delineates the FCC's authority over LNP.

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[45] Further, the Supreme Court has "repeatedly 'declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geir v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000) (citations omitted); *see also AT&T & Central Office Telephone, Inc.*, 524 U.S. 214, 227-28 (1998).

[46] *See* FCC Br. at 35-38. *Rural Telephone Coalition v. FCC,* 838 F.2d 1307, 1315 (D.C. Cir. 1988) (Commission authority to establish the Universal Service Fund can be implied from its statutory obligation to make communications service available to all the people of the United States); *Lincoln Tel. & Tel. Co. v. FCC,* 659 F.2d 1092, 1109 (D.C. Cir. 1981) (extending tariffing obligations to a previously-exempted carrier was appropriate to allow the Commission to ensure that rates and terms and conditions of service are reasonable); *Nader v. FCC*, 520 F2d 182, 204 (D.C. Cir. 1975) (extending rate-setting authority to include prescribing rate of return); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973) (Commission has authority to require common carriers to provide computer network services through a separate affiliate because such requirement was substantially related to Commission statutory obligations, but has no authority to bar common carriers from purchasing computer services from their own affiliate because such rule was unrelated to the regulation of the communications market); *North American*

The Commission's citation to *Qwest Corp. v. FCC*, 252 F.3d 462, 464 (D.C. Cir. 2001), also does not support a contrary conclusion. *Qwest* involved a dispute regarding intercarrier compensation, not LNP. Further, the question of whether Section 332 is an independent basis of Commission authority on interconnection matters has no bearing on whether the Commission has authority to impose LNP obligations on wireless carriers.

Thus, the Commission's theory appeared to be that it has authority to impose wireless LNP because Section 251(b)(2) does not specifically prohibit wireless LNP. A similar Commission theory has been rejected by the D.C. Circuit as "entirely untenable." *MPAA*, 309 F.3d at 805. Indeed, to uphold the Commission's arguments would provide federal agencies "virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Railway*, 29 F.3d at 671 citing *Chevron*, 467 U.S. at 843-44, cited in *MPAA*, 309 F.3d 801, 805-06. While the decision in *MPAA* admittedly addressed First Amendment concerns, the Court relied upon general principles of law and statutory construction recognized in *Railway* to hold that the Commission cannot presume authority to regulate a matter simply because Congress has not expressly withheld such power. *MPAA*, 309 F.3d. at 805-06. Here, the FCC is going even further than in *MPAA* by presuming authority in direct contravention of the Act. The Movants are thus likely to prevail on the merits.

Telecom Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985) (statute was silent regarding proposed limited regulation of holding companies and the Court noted that "Section 4(i) is not infinitely elastic" and cannot be used to regulate an activity unrelated to the communications industry or to contravene another provision of the Act) (citations omitted); *Mobile Comm Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (statute was silent on payments for pioneers procedures). Judge Edwards, in his dissent to *Mobile Comm,* characterized the FCC's reliance upon implied authority as follows: "charitably speaking, the argument is something akin to the FCC saying that it 'has the power to do whatever it pleases merely by virtue of its existence,' a suggestion that this court normally would view as 'incredible.'" *Id.*, 77 F.3d at 1413 (dissent in part).

B. Movants Will Suffer Irreparable Injury if a Stay is Not Granted

There can be no doubt that Movants will be irreparably harmed absent grant of the requested stay of the effectiveness of 47 C.F.R. § 52.31. As discussed in more detail below and in the attached declaration, the implementation of LNP requires modifications to almost every aspect of covered CMRS carriers' business, and will impose enormous costs, both direct and indirect, upon carriers – costs that will not be recoverable. Simply put, Movants – indeed, all covered CMRS providers – will suffer irreparable and virtually immeasurable harm if a stay is not granted.

Courts have long recognized that economic harm may, under certain conditions, satisfy the irreparable injury standard of the *Virginia Petroleum Jobbers* test.[47] In *Wisconsin Gas Co. v. FERC*, for example, the United States Court of Appeals for the District of Columbia Circuit made clear that economic harm may satisfy the irreparable injury standard where the economic loss: (1) is "both certain and great";[48] (2) is an unrecoverable loss;[49] (3) is "likely" to occur;[50] and (4) will result directly from the action which the petitioner seeks to stay.[51] Based on these

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47 *See, e.g., Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985).

48 *Id.*, 758 F.2d at 674. In this regard, the petitioner must demonstrate that "the injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Id.* (citing *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976)).

49 *See id.* at 675 (denying stay where petitioners had several avenues to recover their economic losses). The court stated that *"[r]ecoverable* monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Id.* at 674 (emphasis supplied). However, the *Wisconsin Gas* court "distinguishes *recoverable* monetary loss, which 'may constitute irreparable harm only where the loss threatens the very existence of the movant's business,' from ... *non-recoverable* monetary loss" for which a stay may be granted. *Express One International, Inc. v. United States Postal Service*, 814 F. Supp. 87, 91 (D.D.C. 1992) (citing *Wisconsin Gas, supra,* 158 F.2d at 674) (emphasis supplied, internal citation omitted).

50 *Id.*

51 *Id.*

principles, Movants will be irreparably harmed if the Commission fails to stay the effectiveness of its wireless LNP rules.

First, the harm caused by imposition of these rules is both certain and great. CTIA has estimated that LNP will cost the wireless industry close to $1 billion to implement and $500 million annually to maintain.[52] Merrill Lynch, a global financial management and advisory company, has estimated that the aggregate industry costs associated with LNP could easily range from $5 to $10 billion.[53]

By way of example, Cingular has already spent $15 million this year implementing, and expects to spend an additional $137-$162 million before the end of the year, bringing the total cost of implementation to $152-$177 million for this year alone.[54] Cingular estimates that it will incur incremental LNP costs of over $200 million next year.[55]

Second, the harm to Movants is not only likely to occur, it already is occurring. The attached declaration provides an example of how carriers already have to expend resources on the CMRS LNP mandate, thus providing clear "proof indicating that the harm is certain to occur in the near future."[56]

Third, the economic harm that Movants will suffer from the wireless LNP mandate will be an unrecoverable loss. No "adequate compensatory or other corrective relief will be available

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52 Letter from Thomas Wheeler, President, CTIA, to Michael Powell, Chairman, FCC (dated Feb. 13, 2003, filed Mar. 14, 2003).

53 Merrill Lynch, "Wireless Number Portability – Breaking Ranks?," Linda Mutschler, David Janazzo, Wendy Liu (Feb. 28, 2003). Merrill Lynch's estimate includes increased subscriber acquisition costs resulting from increased customer turnover.

54 Declaration of Kristin S. Rinne, Vice President – Technology and Product Realization, Cingular Wireless, LLC at 2 (appended hereto as Exhibit A).

55 *Id.*

56 *Wisconsin Gas*,758 F.2d at 674.

at a later date."[57] Movants will have no recourse against the Commission if the Court ultimately finds that the Commission did not have jurisdiction to impose wireless LNP. Nor do Movants have a realistic prospect of recovering from their customers the economic harm caused by the unauthorized imposition of LNP. Given the highly competitive nature of the CMRS marketplace, it is unknowable whether customers will tolerate efforts to recover LNP costs through rates or surcharges. In fact, if a Court finds the Commission lacked statutory authority to require CMRS carriers to provide LNP, Movants' ability to recover for LNP costs already incurred, however legitimate, may actually be compromised even further.[58] This strongly militates in favor of a prompt stay of the requirement until the Commission's statutory authority is resolved.

If LNP is allowed to go into effect before the legal question is resolved, further unrecoverable loss will result. Upon implementation of LNP, the FCC has recognized there will be some number of customers who will leave Movants for other carriers, who would not have done so but for LNP.[59] When these customers take service from another carrier, they will sign industry-standard term contracts for one or two years, making them essentially irretrievable to the losing carrier. Further, although there is the prospect that some carriers also will gain new customers as a result of LNP, there is certainly no guarantee that any of the Movants will gain more customers through LNP than it loses. Where there is certainty that some business will be lost irretrievably due to LNP and there is no certainty that enough new business can be gained to

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57 *Id.* quoting *Virginia Petroleum Jobbers*, 259 F.2d at 925.

58 For example, three CMRS carriers are already the subject of a class-action lawsuit in California for, *inter alia,* allegedly imposing LNP-related charges before the service is available to consumers. *Bucy et al. v. AT&T Wireless Services, Inc., Cingular Wireless LLC, and Sprint Corporation,* No. Civ. 432021 (Cal. Super. Ct., San Mateo Cty., filed June 16, 2003).

59 *See, e.g., Verizon Wireless Order*, 17 FCC Rcd at 14979-80.

counterbalance it, the company faces a "real prospect of irreparable harm."[60] And Movants' costs from this LNP-induced churn are likely to be enormous – whether any or all of them emerge as net winners or losers of customers. CMRS carriers spend on average $345 to win each new customer.[61] Analysts estimate that LNP will increase wireless churn by between 0.1% and 0.5% per month, or 1.2% to 6% per year[62] above current levels which are near 30% per year.[63] Based on an industry total of approximately 140 million subscribers,[64] a 0.1% monthly increase in churn translates to $579 million annually in increased customer acquisition costs industry-wide. A 0.5% monthly increase in churn translates to almost $2.9 *billion* in increased annual customer acquisition costs industry-wide. Movants may have little or no recourse to recover these costs, if they win the jurisdictional argument.

Finally, the costs outlined herein and in the attached declaration either are a direct result of LNP implementation or are incremental to the provision of LNP. In sum, although the harm that continued enforcement of the LNP requirement will cause Movants is economic in nature, it is nevertheless "irreparable" because it is *unrecoverable* harm that is certain, great, and a direct result of the LNP requirement.

C. There Will Be No Injury to Other Parties if a Stay is Granted

No other party will be harmed by stay of Section 52.31, including the wireless customers that LNP is intended to benefit. To date consumers have thrived without wireless LNP. Indeed, as the Commission's own *Eighth CMRS Competition Report* demonstrates, the CMRS market is

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60 *NACDL v. United States,* 182 F.3d 981, 985 (D.C. Cir. 1999), quoting *Trout v. Garrett,* 891 F.2d 33, 335 (D.C. Cir. 1989).

61 *See supra* n.52.

62 *Id.*

63 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* WT Docket 03-279, *Eighth Report,* FCC 03-150, at ¶ 68 (2003) ("*Eighth CMRS Competition Report*").

64 *Id.* at ¶ 59.

more competitive today than in 1997, when the wireless LNP rule was first adopted (but not implemented) and in 1999 when the Commission temporarily forbore from enforcing the rule.

> During 2002, the CMRS industry continued to experience increased service availability, lower prices for consumers, innovation, and a wider variety of service offerings. . . . To date, 270 million people, or 95 percent of the total U.S. population, live in counties with access to three or more different operators (cellular, broadband PCS, and/or digital SMR providers) offering mobile telephone service, a slight increase from what the Commission found in the *Seventh Report*. More than 236 million people, or 83 percent of the U.S. population, live in counties with five or more mobile telephone operators competing to offer service. . . . Furthermore, the average price of mobile telephone service has declined during the year since the *Seventh Report*, continuing the trend of the last several years.[65]

Moreover, customers continue to switch carriers routinely. Indeed, as the Commission recently reported:

> Most carriers report churn rates between 1.5 percent and 3 percent per month. *At current rates, more than 30 percent of subscribers change service providers each year.* Average monthly churn rates for mobile telephone service have remained fairly constant over the past three years. . . . Consistent with findings in previous reports, *customers indicated cost and network quality as the main reasons for changing providers. A survey conducted in 2002 by the Yankee Group research firm found that 26 percent of wireless subscribers claimed pricing played the largest role in whether they would switch carriers, while 20 percent felt improved coverage was the most important issue. Phone upgrade programs came in third with 14 percent, and loyalty programs came in fourth with 13 percent of survey respondents. One Yankee Group analyst claimed that it only took a 10 to 15 percent price difference to lure wireless subscribers to another carrier.*[66]

In sum, given the long-term trends of increasing competition in the CMRS market and the state of CMRS competition demonstrated in the Commission's *Eighth CMRS Competition*

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65 *Id.* at ¶¶ 17-18 (footnotes omitted).

66 *Id.* at ¶¶ 68-69 (footnotes omitted and emphasis supplied).

Report, there is no basis to conclude that stay of wireless LNP implementation date would in any way harm consumers.

Further, local exchange carriers have appealed to Congress to delay the effective date of the FCC's wireless number portability rule, because of the many issues that need to be resolved on a technical and operational level before wireline-wireless portability can be implemented without substantial disruption.[67] The FCC would also not be harmed by a stay. In fact, a stay would give the Commission the opportunity to consider and resolve the open issues, that it needs to address before wireless number portability is implemented. Some of these matters are discussed in the following section.

D. The Public Interest will be Served by Grant of a Stay

As discussed above, the Commission has no authority to impose LNP obligations on CMRS carriers. Further, Movants and other CMRS carriers face enormous, unrecoverable loss absent a stay of the November 24, 2003 wireless LNP implementation deadline. In contrast, no third party, including consumers, will suffer harm if such a stay is granted. In short, the balance of the equities easily demonstrates that grant of the requested stay will serve the public interest because it will (1) avoid the implementation of an unlawful rule, (2) protect CMRS carriers from potentially irreparable economic harm resulting from implementation of the unlawful rule, and (3) not impose new and untoward burdens on third parties.

Stay of the November 24, 2003, deadline will also serve the public interest by preventing the implementation of CMRS LNP in the face of numerous, substantial and unresolved issues. To date, there are no Commission rules or carrier agreements to govern implementation of CMRS LNP. This regulatory vacuum has created confusion for carriers and will result in

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[67] *See* Letter from Independent Telephone and Telecommunications Alliance, United States Telecom Association, and Western Alliance to The Honorable John McCain, Chairman, Committee on Commerce, Science and Transportation, United States Senate (dated July 22, 2003).

confusion for their customers. Such confusion will cause additional costs to carriers and their customers if the CMRS LNP rule is ultimately declared unlawful.

The issues that need to be resolved, assuming the validity of the FCC's wireless number portability rule, include, among others:

- ***Rate Center Disparity*** — Wireless carriers have a numbering "presence" in only about 8% of local exchange carriers' rate centers, as a result of which there is a serious dispute about whether numbers can or should be ported between wireless and wireline service providers in most cases. Wireless carriers take the position that they should not be obliged to port numbers (assuming the basic rule is valid) until wireline local exchange carriers have the capability and obligation to port any wireline number to a wireless carrier serving the area. There is a similar wireless-to-wireless porting issue still pending.

- ***Porting Interval*** — Local exchange carriers use a four-day interval for porting numbers among themselves, which is much longer than the two-and-a-half hour interval suggested by many wireless carriers, there is no Commission adopted standard for either a wireline-wireless or a wireless-wireless porting interval.

- ***Interconnection and Porting Agreements*** — There is a fundamental dispute among wireline and wireless carriers on whether an interconnection agreement is needed between porting carriers, and there is also a lack of agreement on whether carriers have an obligation to enter into agreements regarding the implementation of porting (or what such agreements should provide). Given these disputes, there are few, if any, agreements in place. Without consensus on what kind of agreement is needed, and with no FCC action on the issue, it is questionable how porting will be accomplished.

- ***Effect of Interconnection Type*** — There are unresolved disputes about whether and how numbers can be ported to and from wireless carriers using what is known as "Type 1" interconnection.

- ***Business Rules*** — There is disagreement about whether wireless carriers must port the number of a carrier that has an outstanding contract term commitment or an outstanding balance. An FCC staff letter taking the position that carriers have an obligation to port regardless of customers' outstanding obligations did not address the arguments opposing that view and has been challenged.

Many of these LNP implementation issues have been outstanding since 1998 when the NANC, an advisory committee commissioned by the FCC to make recommendations and coordinate number portability, presented to the FCC a list of outstanding policy and technical

issues that could not be resolved absent more specific direction from the Commission.[68] The Commission, however, has failed to issue any orders in response to the NANC submissions.

This lack of LNP standards is significant because implementing wireless LNP absent clarification of the many outstanding issues will cause tremendous confusion among customers and carriers regarding their respective rights and obligations, canceling any predicted benefits from the wireless LNP requirement. For instance, without specific Commission guidance, each CMRS carrier is free to adopt its own porting interval, making it impossible for a customer to know beforehand when its port might be completed. Similarly, customers may not be able to port a number unless the carriers' salespersons know what rate center they are in which is simply an unrealistic expectation given the carriers' reliance on a diversity of retail distribution channels. Similarly, salespersons will be unable to determine whether a port will affect a customer's ability to roam or to access E911.

The wireless industry has repeatedly urged the Commission to resolve the outstanding issues essential to effective LNP deployment.[69] In January 2003, the CTIA filed a petition seeking a declaratory ruling on whether historic wireline rate center boundaries can be used by carriers to limit consumers' access to wireless LNP ("*CTIA Rate Center Petition*").[70] CTIA also filed its *LNP Implementation Petition* in May 2003 seeking clarification on several other wireless LNP issues which remain unresolved, including issues related to porting intervals (and the

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68 *North American Numbering Council Local Number Portability Administration Working Group Report on Wireless Wireline Integration,* CC Dkt. 95-116 (filed May 18, 1998).

69 Incumbent local exchange carriers have also recognized that there are a number of difficult LNP implementation issues that "have not yet been resolved by the FCC and are unlikely to be resolved before November 24, 2003. *See* Letter from Independent Telephone and Telecommunications Alliance, United States Telecom Association, and Western Alliance to The Honorable John McCain, Chairman, Committee on Commerce, Science and Transportation, United States Senate (dated July 22, 2003).

70 *CTIA Petition for Declaratory Ruling*, CC Dkt. 95-116 (filed January 23, 2003).

provision of E-911 services during such intervals) and whether wireless carriers should have to enter interconnection negotiations for number portability.[71]

In response to the *CTIA LNP Implementation Petition*, Verizon Wireless submitted a written *ex parte* in which it asked the Commission to state that a porting-out carrier may not impose restrictions on releasing the number other than those necessary for customer validation.[72] According to Verizon Wireless, this issue is a "sub-set" of the porting interval issue raised by CTIA.[73] In their comments on the CTIA petitions, certain parties addressed the "port conditioning" issue raised by Verizon Wireless.[74] The Commission has not yet issued a decision on either CTIA petition. Instead, on July 3, 2003, John Muleta, Chief, Wireless Telecommunications Bureau, released a letter, addressing several issues related to the implementation of wireless LNP, including a statement that wireless carriers may not delay the porting of a number for any reason "unrelated to validating a customer's identity."[75]

The *WTB Letter* was challenged by Movants and other carriers on August 1, 2003.[76] As pointed out, Mr. Muleta's directive on unconditional porting, if binding, would force carriers to facilitate breach of contracts and impede their ability to offer many benefits valued by wireless consumers. Today all carriers require their customers to pay for services provided, to make

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71 *CTIA LNP Implementation Petition*, CC Dkt. 95-116 n. 4 (filed May 13, 2003).

72 *Ex Parte* Letter of J. Scott (Verizon Wireless) to M. Dortch, FCC Secretary, CC Dkt. 95-116 (May 20, 2003).

73 *Id.* at 2.

74 *See, e.g.*, Cingular Comments on *CTIA LNP Implementation Petition* at 21-25 (June 13, 2003); Nextel Comments on *CTIA LNP Implementation Petition* at 7-10 (June 13, 2003); AWS Reply Comments on *CTIA LNP Implementation Petition* at 8-9 (June 24, 2003).

75 John Muleta, Chief, Wireless Telecommunications Bureau, to John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless and Michael T. Altschul, Senior Vice President, General Counsel, Cellular Telecommunications & Internet Association, DA 03-2190 (date June 3, 2003) ("*WTB Letter*").

76 *See* Petition for Declaratory Ruling or, in the Alternative, Application for Review, CC Dkt. 95-116 (filed Aug. 1, 2003).

those payments within a reasonable time, and, in many cases, to agree to a minimum contract term in exchange for certain service and equipment benefits (*e.g.*, a lower rate, more minutes, free night and weekend minutes, a subsidized handset).[77] The *WTB Letter* would change that dynamic by requiring wireless carriers to actively facilitate and indeed effectuate contract violations.

In sum, the current regulatory situation regarding wireless LNP implementation raises not only basic questions regarding carriers' and customers' respective rights and obligations, but also raises profound questions regarding the current competitive structure of the CMRS marketplace itself. If upheld, the unconditional porting obligation would fundamentally alter the bargaining positions of carriers and their customers. Such a result would directly conflict with the Commission's recent finding that, in competitive markets, the Communications Act allows carriers and customers maximum negotiating flexibility.[78]

While Movants are mindful that the wireless LNP deadline has already been postponed several times, they submit that proceeding with the current deadline would be a serious mistake. Moving forward in the absence of resolution of the many difficult and substantive implementation issues that remain pending will ensure chaos for carriers and confusion for consumers. Simply put, the deadline for wireless LNP implementation should be only after the Commission effectively and finally resolves the lingering implementation issues and there is a final judicial determination that the Commission was empowered to impose the CMRS LNP mandate. Grant of the requested stay would provide the Commission time to resolve these issues as well as enable Movants to secure judicial review over basic question of whether the

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[77] *See id.*

[78] *See id.* citing. *Orloff v. AirTouch Licenses*, 17 FCC Rcd 8987 (2002); *Ting v. AT&T*, 319 F.3d 1126, 1144-46 (9th Cir. 2003); *see also* Cingular Comments on *CTIA LNP Implementation Petition* at 23.

Commission has authority to impose LNP obligations on CMRS carriers in the first place. Movants submit, therefore, that grant of the requested stay will serve the public interest.

CONCLUSION

For the foregoing reasons, Movants request that the Commission stay the November 24, 2003 CMRS LNP implementation deadline pending Commission action and final judicial review on the *Petition to Rescind*.

Respectfully submitted,

CINGULAR WIRELESS LLC AND
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August 15, 2003

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Telephone Number Portability	)	
	)	CC Docket No. 95-116
Repeal of Section 52.31 of the	)	
Commission's Rules Regarding	)	
Commercial Mobile Radio Service	)	
Local Number Portability	)	
	)	

DECLARATION OF KRISTIN S. RINNE

I, Kristin S. Rinne, am Vice President – Technology and Product Realization for Cingular Wireless, LLC ("Cingular"). As such, I am responsible for new product development from a technology standpoint, handset certification, and infrastructure vendor coordination. In this capacity, I oversee the project team responsible for implementing local number portability ("LNP") and chair the interdepartmental portability steering committee. In this declaration, I will describe the expenses that Cingular has incurred to date, and will incur, if the Federal Communications Commission ("Commission") fails to suspend the Commercial Mobile Radio Service ("CMRS") LNP rule in 47 C.F.R. section 52.31 pending a decision on whether the Commission possessed the legal authority to require CMRS carriers to provide LNP.

I. INTRODUCTION

The initial implementation of LNP requires enormous and costly modifications to almost every aspect of Cingular's business, and the ongoing provision of LNP will result in significant recurring costs. While it is true that some of the costs to provide LNP were incurred in order to participate in thousands-block number pooling by November 24, 2002, there remain enormous LNP costs that are incremental to the cost of pooling and result solely from the LNP

requirement. In this Declaration, I seek to quantify only the incremental cost of LNP above and beyond the cost of number pooling.

The enormous initial, incremental costs to implement LNP include, among other things:

- changing existing business operations and policies governing activation and termination of service;
- resources required to develop new policies and procedures specifically for an LNP environment;
- establishing intercarrier communications processes and interfaces for sending and receiving port requests;
- hiring and training employees for the LNP inter-carrier communications and customer care centers;
- modifying and supplementing existing Operational Support System ("OSS") infrastructure and adding OSS capacity to support anticipated volumes of number ports;
- added customer acquisition, churn, and retention costs; and
- lost opportunities to invest capital that must be diverted to LNP implementation from other, revenue-generating endeavors.

Cingular already has expended over $15 million in 2003 toward these ends, and expects to expend an additional $137- $162 million before the end of the year, bringing the year 2003 total implementation cost near $152 - $177 million.

As further described below, once it has fully implemented LNP processes and procedures, Cingular will incur significant *ongoing* costs for providing LNP. Cingular estimates that it will incur incremental costs of over $200 million to provide LNP in 2004.

Given the lack of clear FCC rules regarding wireless LNP requirements and procedures, it appears likely that wireless and wireline carriers will implement portability procedures with respect to wireless carriers that differ from one another. These differences will lead to widespread customer confusion and dislocation that will reduce customer goodwill and damage customer relations. Moreover, there are other non-quantifiable opportunity costs that Cingular

will incur. The time and resources that Cingular will divert away from existing operations and other areas in order to implement and provide LNP will mean less time and resources spent on improving service quality and performance as well as revenue-generating and business development opportunities.

Finally, given that there are many unresolved issues surrounding the porting process and given the high volumes anticipated for wireless ports, it is likely that the porting process at least initially will experience a number of problems and delays. For example, there may well be a number of unsuccessful ports, network call routing failures, and other porting problems once LNP is implemented. These problems will be exacerbated because the November 24 deployment date falls in the middle of the wireless industry's busiest selling season of the year. Any porting failures and network problems would have considerable adverse impacts on individual customers and businesses. These porting-related problems will have negative consequences for Cingular's business in terms of a loss of customer good will.

II. LNP IMPLEMENTATION COSTS IN 2003

The initial, incremental effort to implement LNP affects virtually all of Cingular's existing systems, processes, and procedures, which will have to be modified to accommodate the porting of numbers. These implementation costs will total between $152 and $177 million in 2003 and they include:

- Incremental customer retention costs resulting from LNP.
- Start-up costs for a customer retention center in Jacksonville, Florida. The need to establish the customer retention center was driven by the LNP requirement.
- Upgrading and supplementing existing OSS infrastructure and adding OSS capacity to support anticipated volumes of number ports.
- Increased customer operation expenses, including developing and staffing porting activation centers (PACs) and porting support centers (PSCs), located in Baton

Rouge, Louisiana; Ashland, Kentucky; and Cedartown, Georgia. These centers will focus solely on processing and activating number ports and addressing LNP-related issues. These costs include hiring, training, and the other additional cost of added headcount, such as office space and benefits. The recurring costs of these centers are discussed in the next section.

- Increased media costs.

- Up-front payments to an outside vendor whom Cingular and many other carriers have retained to act as a clearinghouse for LNP-related pre-port intercarrier communications.

- Training costs for sales personnel.

- Increased network management and operations staffing. LNP will increase the cost of network management and operations by increasing the complexity of many functions, such as expanding coverage areas, implementing network routing or global title translations changes, or performing the network changes necessary when new switches are implemented.

In Section IV, below, I discuss the extent to which these costs can be avoided if the LNP requirement is stayed or eliminated in advance of November 24, 2003, when the rule goes into effect. There also are numerous other, smaller line items (such as training and added management costs) that also will be incurred to implement LNP.

It should be noted that all of these costs include only the implementation costs that Cingular itself will incur as a result of LNP. It does not include the costs that Cingular's resellers will incur in order to modify their systems to interface with the systems that Cingular is forced to modify due to LNP. Similarly, it does not include the costs that independent Cingular sales agents will face in order to modify their systems and practices to accommodate the changes Cingular must make to accommodate LNP.

III. OPERATIONAL COSTS OF LNP IN 2004

Cingular also will incur inordinate incremental expenses on an *ongoing* basis to maintain operations that support LNP. These 2004 costs will total over $200 million. The ongoing costs to support LNP include:

- Substantial incremental customer acquisition costs due to increased churn levels.
- Added recurring cost of the customer retention center in Jacksonville, Florida.
- Ongoing incremental customer operation expenses, including the ongoing costs of the PACs and PSCs, focusing solely on processing and activating number ports and addressing LNP-related issues.
- Porting transaction fees for the Number Portability Administration Center ("NPAC").
- Payments to the outside vendor to act as a clearinghouse for LNP-related pre-port intercarrier communications.

IV. SUBSTANTIAL COSTS CAN BE AVOIDED BY STAYING OR ELIMINATING THE LNP REQUIREMENT

Cingular has expended substantial resources to implement the network upgrades and changes that were required for both pooling and porting to meet the November 2002 pooling requirements. Since then, we have continued to expend resources and capital in preparing for the portability deadline. There still remain very significant costs that could be avoided if the LNP requirement is stayed or eliminated. Cingular is spending money each day to prepare for the November 24, 2003 implementation deadline. The costs Cingular will incur on LNP in the months from September 2003 through December 2003 will be no less than $28 to $42 million per month.

In particular, the significant increase in customer acquisition cost resulting from increased churn can be delayed for each month the LNP requirement is stayed, and can be avoided altogether if the LNP requirement is eliminated.

The significant costs of customer retention programs related to LNP have begun this month. Cingular plans to increase spending on customer retention programs through 2003. Eliminating the LNP mandate would thus result in substantial saving in the remainder 2003 and 2004.

Customer operations costs due to LNP, including the costs of the PAC and PSC, will begin a steep increase in August and rise throughout the remainder of 2003. These costs will also be substantial in 2004.

In addition, Cingular's expenditures on IT modifications necessary to support LNP will begin to increase sharply during August, September, and October, as the final changes to OSS infrastructure, billing, and other systems are completed.

The bulk of the costs for the Jacksonville retention center were incurred in July. Nevertheless, Cingular's anticipated cost of running the center could be ramped down if the requirement were eliminated, resulting in substantial savings.

Many of the other, smaller line items (such as training and added management costs) can still be avoided if the LNP requirement is eliminated in the near term.

V. OTHER INDIRECT COSTS

As I discuss, there are a variety of substantial costs and harms resulting from LNP implementation and operation. In addition to these costs, Cingular may experience other negative effects that result from LNP implementation at this time.

The modifications that Cingular is making, and will continue to make, in order to implement LNP policies and procedures, upgrade its network and modify business operations, and maintain and operate systems to support LNP also inflict considerable cost and harm upon Cingular beyond the mere dollars associated with these activities. The resources and time that Cingular will spend on modifying existing business operations and processes to accommodate LNP are resources and time diverted away from service quality improvement, business development and growth, and network expansion. For example, Cingular's information technology department is diverting substantial capital investment in 2003 into LNP implementation which would otherwise have been used for customer care, billing, and retail support investments, which would have supported revenue-generating services. These costs may not be quantifiable but are considerable, given the challenges facing the telecommunications industry in the capital markets.

At a time when wireless carriers have not finished building out their networks on a nationwide basis and converting to more spectrum-efficient technologies, FCC-mandated porting requirements necessarily compete with other priorities for scarce financial resources. The energy and resources that Cingular is devoting to comply with the LNP rule must be balanced against carriers' efforts to meet existing customers' needs in other areas; providing other competitive choices, features, and services for customers; building out the network to ensure service quality; and implementing other governmental requirements aimed at protecting life and safety.

In addition, due to the lack of legally enforceable porting guidelines for wireless carriers, there is considerable confusion about some basic elements of the porting process. Further, there are unresolved concerns about whether the intercarrier interfaces supporting LNP will handle the

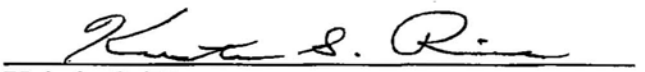
increased volumes. Given these uncertainties, there very well may be porting errors or delays, which will result in further harm to both Cingular and its customers.

The Commission has yet to resolve some of the most fundamental questions and issues pertaining to the porting process for wireless carriers, including the appropriate porting interval and the processes and procedures for wireline-wireless and wireless-wireless porting. This means that some carriers may decide to port a number within a few hours, while other carriers may prefer a few days to complete a port. The lack of clear Commission rules and guidelines on these unresolved porting issues will result in conflicting carrier actions and possible porting delays and failures. Ultimately, this will mean that customers will be confused and frustrated, which will negatively affect Cingular in terms of loss of customer good will.

Similarly, because some carriers have not engaged in adequate inter-carrier testing, there may be additional problems that have not been fully resolved with regard to that process. Moreover, it is still uncertain whether the intercarrier LNP infrastructure will be able to handle the substantially increased volumes of ported numbers once wireless LNP is implemented. Some estimates are that wireless porting volumes will add up to 30.8 million messages on the LNP architecture per month; and that the increased volumes on carriers' Service Order Administration (SOA) and Local Service Management Systems (LSMS) may create backlogs, which may result in incorrect routing information. In fact, when Australia introduced LNP, several carriers' LNP systems crashed several times, and there were backlogs taking up to three days – much longer than the two hours and ten minutes allotted for porting in that country. It is unclear exactly what the dollar impact is from these types of porting issues and failures, but they are likely to have negative effects on customers and carriers alike.

Given the fact that the Commission has failed to issue clear rules governing the porting process and that there may be technical difficulties as a result of the initial implementation of wireless LNP, consumers will experience frustration and difficulty in the porting process. This is particularly true given that the November 24 implementation date falls in the middle of the wireless industry's busiest selling season of the year. Not only would these delays and porting difficulties be detrimental to individuals and businesses and cost money for those seeking to port, but the frustration and confusion that customers experience will ultimately affect and taint Cingular's business relations with these customers.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on this 15th day of August, 2003.



Kristin S. Rinne